

BEFORE THE
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C. 20036

In the Matter of)
)
Compulsory License For) Docket No. CRT80-3
Secondary Transmissions By)
Cable Systems; Royalty)
Adjustment Proceeding)

Copyright Owners 1/ hereby respond to the Opposition, filed by National Cable Television Association (NCTA) on March 6, 1981 to the Copyright Owners' Petition for Declaratory Order requesting that the Tribunal rule:

1. Cable systems are obligated for payment of the higher royalty fees required by the Final Order (46 Fed. Reg. 892) in this docket as of January 1, 1981.

2. Interest under Section 111(b)(3) on the higher royalty fees must be calculated from the first semi-annual deposit date in 1981 through the date of actual payment by a cable system. Such interest must be paid by the cable system if it chooses not to deposit the higher royalty fees with the Copyright Office as part of its first semi-annual deposit in 1981 until such time as it actually pays the higher royalty.

Copyright Owners submit that a declaratory ruling on each of these matters is properly issued at this time as well as that the rulings are compelled by legal and equitable principles.

1/ Copyright Owners are listed in Attachment A.

NCTA's opposition calls to mind the old saw: if the law is against your position, argue the facts; conversely, if the facts are against your position, argue the law. As neither the facts nor the law were helpful to NCTA, it relied instead on a mishmash of rhetoric to the general effect that there is some procedural infirmity in the request for a declaratory ruling. That argument will be addressed. However, at the very outset it is important to note that NCTA's opposition is limited to the second question raised by that request -- the imposition of interest charges. It does not address the first question presented -- cable systems' obligation to pay the higher royalty fees as of January 1, 1981 -- and such obligation is therefore conceded by NCTA.

NCTA's opposition is devoid of any reference to judicial authority or to the facts in this case. It asserts, however, that Copyright Owners "have been able to cite no authority for the power of the Tribunal to impose an interest obligation. The analogies cited are all inapposite" That position is patently wrong. The authorities relied upon by Copyright Owners do establish that under the rules governing the federal courts and the administrative agencies, interest is always applied to the period during which an appeal is pending from a judgment allowing a money award where the loss of interest is a natural and proximate result of the stay of payment during the appeal. These cases are all apposite here because they show the overwhelming weight of

authority holds that should a money judgment not be paid during an appeal, interest is properly allowed.

NCTA argues further, however, that no statutory power exists for the Tribunal "to assess interest" for those amounts not paid by cable systems during the appeal.

(Opposition, 4.) NCTA suggests that the statute must contain specific language giving the Tribunal power to assess interest before it can do so. This misstates the law. In Rodgers v. United States, 332 U.S. 371, 373 (1947), the Supreme Court held that the existence of statutory language is not controlling on the question of the obligation to pay interest.

But the failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligations shall not bear interest. For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court.

As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligations and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained.

(Citations omitted.) Here, the obligation runs from the cable systems to the Copyright Owners as a compulsory license fee for the retransmission of programs. The proceeding was an attempt to maintain the real constant dollar level of payment

under the compulsory license. It is evident that an erosion of that level will occur should the cable systems not pay during the pendency of the appeal. Erosion will occur also should the cable systems not be required to pay amounts equal to the interest that would have accrued and been distributed to Copyright Owners under Section 111(d)(3). The equities, as well as the statutory design, require payment of interest: Copyright Owners are the beneficiaries of the copyright royalty scheme under which interest as well as principal are necessary to help maintain the real constant dollar level of the benefits.

Other courts have followed similar guidelines in judging whether interest can be allowed with compensatory awards. In ruling that interest could be awarded in the absence of statutory language, Judge (now Chief Justice Berger) focused the inquiry on the objective of promoting the goals of the overall act in determining whether awarding interest is consistent with those goals, rather than on whether explicit language could be found in the act for granting interest.

In the evolution of the law of remedies some things are bound to happen for the "first time". As a supplement to existing remedies long approved we cannot say that the allowance of interest is other than a factor which effectuates the policies of the Act for it is plainly in the direction of making the employee whole. We cannot regard changes in remedial mechanisms as beyond the Board's powers so long as they reasonably effectuate the Congressional policies underlying the statutory scheme.

National Brotherhood of Operative Potters v. NLRB, 320 F.2d 757, 761 (D.C. Cir. 1963), citations omitted.

Accord United Gas Improvement Co. v. Callery Properties, 382 U.S. 223, 230 (1965); Strachan Shipping Co. v. Wedemeyer, 452 F.2d 1225, 1227-1229 (5th Cir. 1971); McClanahan v. Mathews, 440 F.2d 320, 325-326 (6th Cir. 1971); Philip Carey Mfg. Co. v. NLRB, 351 F.2d 720, 729-730 (6th Cir. 1964). The Copyright Act provides for the payment of compulsory license fees at a constant dollar level and it provides that interest shall be made part of the distribution fund. Ruling that interest would be required for the period of non-payment during the pendency of appeals would effectuate the statutory purpose.^{2/}

Turning to NCTA's procedural argument -- it is difficult to determine whether it is asserting that the petition was filed too late or too early because it appears to suggest both grounds.^{3/} NCTA "seriously question[s] whether the Tribunal can even attempt to address" the issue because the matter "is not within the Tribunal's jurisdiction." (Opposition, 2.) Copyright Owners pointed out in its Petition that a declaratory order is proper at this time under Section 554(e) of the Administrative Procedure Act (which governs the procedures of the Tribunal, 17 U.S.C. §803(a) in order "to remove uncertainty." It appears now in light of NCTA's

^{2/} As would ruling that any over payments by cable systems would be returned with interest; nothing in the Act suggests that interest on overpayments be retained by the Tribunal or be put into the distribution fund. The only proper remedy would be for such amounts to be returned to those cable systems which overpaid.

^{3/} Since its argument and conclusion appear to rely on the claim that the petition was filed too late, that argument only will be addressed in this reply.

opposition that a declaratory ruling is also necessary "to terminate a controversy." The Copyright Owners have a right to know the fee which cable is obligated to pay for the compulsory license; and cable systems have a right to know the extent of their liability. The questions raised by the Petition are ones not likely to disappear through the appellate process, and thus they must be faced. In these circumstances, a motion for declaratory ruling is properly before the Tribunal and can be resolved under the standards set out in Section 554(e).

NCTA suggests that the filing of an appeal leaves the Tribunal "powerless to amplify or amend its order at this time." No support is provided for this suggestion. More important, however, these declaratory rulings do not "amplify or amend" the final order. The proposed declaratory rulings will not increase the award above the level ordered. The requests for rulings seek only a determination that liability begins to run as of January 1, 1981, the date that the higher rates were allowed. The requests seek a declaration of the existing rights, not an expansion, and are within the terms of the final order, and as previously noted NCTA does not dispute that obligation. Further, a declaratory ruling is proper even though another remedy exists or the issue may be raised in a different forum. See, Provident Bank & Trust Co.

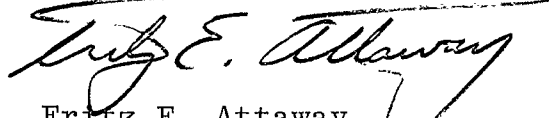
v. Patterson, 390 U.S. 102, 125-128 (1968). 4/ One noted commentator has stated the issue in such cases to be, "whether the declaratory action will probably result in a just and more expeditious and economical determination of the entire controversy". Wright, Law of Federal Courts, §100,500 (2d ed. 1976).

Should the cable systems not pay any higher sums to the Copyright Office during the pendency of the appeal, they would be faced with the prospect of a large lump sum payment at that time. Such a prospect will surely harden positions and create additional, unnecessary litigation. Resolution of the questions posed in the Petition will provide certainty, allow the question to be resolved within the current appellate litigation, if necessary, and will avoid the probable, lengthy litigation that would result should the matter be deferred. Accordingly, the issue should be resolved at this time through a declaratory order.

4/ Nothing in the Copyright Act or the Administrative Procedure Act suggests that the court of appeals obtains exclusive jurisdiction over the proceeding once the record has been filed. This contrasts with other statutory schemes which expressly give the court exclusive jurisdiction; for example, the Natural Gas Act and the Federal Power Act provide: "Upon the filing of such petitions, such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part." 15 U.S.C. §717r(b) and 16 U.S.C. §8251(b) (emphasis added). Should the Tribunal determine, contrary to our position, that this request involves changing the order on appeal, it does not follow that the court has exclusive jurisdiction. In any event, it would appear that the court would seek the Tribunal's ruling on a matter of first impression as to interpretation of the Act prior to rendering a decision of its own.

For the reasons stated here and in our Petition,
Copyright Owners urge the Tribunal to issue the declaratory
rulings requested.

Respectfully submitted,

A handwritten signature in cursive script, reading "Fritz E. Attaway". The signature is written in dark ink and is positioned above the printed name and title.

Fritz E. Attaway
On Behalf of
Copyright Owners

Attachment A

Copyright Owners include:

American Society of Composers, Authors and Publishers;

Broadcast Music, Inc.;

Major League Baseball;

Motion Picture Association of America, Inc.;

National Association of Broadcasters;

National Basketball Association;

National Hockey League;

and North American Soccer League.

CERTIFICATE OF SERVICE

I, Robin Ross, hereby certify that copies
of the foregoing were mailed first class, postage pre-
paid to the following on the sixteenth day of March,
1981:

Stuart F. Feldstein, Esquire
Fleischman & Walsh
1725 N Street, N.W.
Washington, D.C. 20036

Brenda Lee Fox, Esquire
National Cable Television Association
918 16th Street, N.W.
Washington, D.C. 20006



Robin Ross

COPYRIGHT ROYALTY TRIBUNAL**Commencement of Obligation To Pay
Adjusted Royalty Fees**

March 16, 1981.

The American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; Major League Baseball; Motion Picture Association of America, Inc.; National Association of Broadcasters; National Basketball Association; National Hockey League; and North American Soccer League (Copyright Owners) in the matter of Compulsory License for Secondary Transmissions by Cable Systems; Royalty Adjustment Proceeding, CRT Docket No. 80-3, have filed a Petition for Declaratory Relief to the effect that if the Tribunal's adjustment of cable royalties is sustained on judicial review that:

1. Cable systems are obligated for payment of the adjusted royalty fees as of January 1, 1981.
2. Interest on the adjusted royalty fees must be calculated from the first semi-annual deposit date in 1981 through the date of actual payment by a cable system.

The National Cable Television Association has filed an Opposition to Petition for Declaratory Relief urging the dismissal or denial of the petition.

The Petition of the Copyright Owners and the Opposition of the National Cable Television Association are available for inspection in the office of the Tribunal.

The pending Petition for Declaratory Relief presents questions of general application to all Tribunal royalty adjustment proceedings. Therefore the Tribunal has determined that prior to any action on the petition, the Tribunal should provide an opportunity for comments by any interested person on the issues presented by the Petition and the general subject of any retroactive application of Tribunal royalty rate adjustments.

Any person desiring to present views to the Tribunal on these matters shall submit such comments not later than April 15, 1981. Comments should be addressed to Chairman, Copyright Royalty Tribunal, 1111 20th Street, NW., Washington, D.C. 20036.

Clarence L. James, Jr.,

Chairman, Copyright Royalty Tribunal.

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